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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 1018

MANUEL SANCHEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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I. JURISDICTION

A. Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals for the Ninth Circuit was entered on December 26, 1962, is reported in 311 F.2d 327 and is set forth in the appendix hereto. (Appendix, Exhibit A.)

B. Abbreviations Used Herein

References to the Reporter's District Court trial transcript are designated herein by the abbreviation "R.T.".

C. Nature of the Case

Petitioner was convicted in the District Court on two counts of violation of the Jones-Miller Act, Title 21 U.S.C. Sec. 176(a), (70 Stat. 570) to wit, unlawful sale and concealment of marihuana. On December 8, 1960, the defendant was sentenced to a term of five years imprisonment on each of said counts, the sentences to run concurrently.

The Court of Appeals sustained both of the convictions.

D. Date of Judgment Sought to Be Reviewed

On December 8, 1960, Petitioner was adjudged guilty on the aforesaid counts and was sentenced by the District Court to imprisonment for a period of five years on each count, the sentences to run concurrently.

The opinion of the Court of Appeals was filed on December 26, 1962. (Appendix, Exhibit A.) The judgment of said Court was filed on the same date. (Appendix, Exhibit B.)

E. Denial of Rehearing and Extension of Time

After the filing of the decision of the Court of Appeals, a Petition for Rehearing was submitted to the Court of Appeals and this Petition was denied on February 13, 1963.

On March 4, 1963 this Court extended to April 13, 1963 the time for filing this Petition.

F. Statutory Jurisdiction of This Court

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254 (62 Stat. 928).

G. Questions Presented for Review

Question No. 1

Where the Reporter's Transcript of record of the evidence adduced in a federal criminal trial shows no probable cause for an arrest and search by Government Agents, is evidence discovered as a result of the search obtained in violation of substantive constitutional rights protected by the Fourth and Fifth Amendments and not to be considered as evidence against the aggrieved party when challenged in the first instance on appeal; and, did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings and decide that there was probable cause herein in a way in conflict with applicable decisions of this Court?

Question No. 2

When a defendant in a federal criminal trial informs the trial Court after the Government has rested its case in chief that his attorney will not cooperate with him, that he would hire another attorney or proceed in propria persona, that the attorney had failed to call certain material witnesses, is it prejudicial error and or a violation of the defendant's rights

secured by the Fifth and Sixth Amendments to deny the defendant's motion to discharge counsel?

Question No. 3

Where the Government fails to call available material witnesses, who have plead guilty to the same charges on which petitioner is standing trial and therefore cannot incriminate themselves by testifying, and it is apparent from the record what the said witnesses observed, is there an abuse of discretion or denial of due process by the trial Court in denying petitioner's motion for a short continuance in order to obtain their presence by petitioner?

H. Applicable Constitutional Provisions, Statutes and Rules

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

21 U.S.C. § 176(a) (70 Stat. 570) provides in part:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, * * *, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * *, shall be imprisoned * * *.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to author-

ize conviction unless the defendant explains his possession to the satisfaction of the jury."

28 U.S.C. § 1654 (63 Stat. 103) provides:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Rule 41(e), Federal Rules of Criminal Procedure, provides:

"A person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> "Plain errors or defects affecting substantial rights may be noticed (on appeal) although they were not brought to the attention of the court."

Rule 13(b), Rules of Practice, United States District Court, Northern District of California, provides:

> "A motion to postpone or continue a trial on the grounds of absence of a witness or evidence shall be made upon affidavit showing the nature and materiality of the expected testimony or evidence, and that diligent effort has been made to secure the witness or evidence."

II. STATEMENT OF THE CASE

The Petitioner was charged in two counts of a three count indictment. Count I charged Petitioner with the unlawful sale of approximately one pound of marihuana in the City and County of San Francisco, State of California, on April 25, 1960. Count II charged Petitioner with the unlawful concealing and facilitating the concealment of approximately five pounds of marihuana in the said City and County and State on the same date. The persons Elroy Jones and John Henry Martinez plead "Guilty" to the said charges in other proceedings. (R.T. 101.)

The Federal Narcotics Bureau originally received information from the United States Customs Service that large amounts of marihuana were being smuggled into San Francisco. They had utilized an informer by

the name of Raoul Miller who could make a purchase of same from a man by the name of Elroy Jones. The Service also informed the Bureau that they believed some of the marihuana was used and would be hidden at 383-A South Van Ness Avenue in San Francisco (R.T. 92), which is between 14th and 15th Streets. The officers and agents did not obtain a warrant. (R.T. 102.)

With this information, Federal Narcotics agents, Customs agents and Officers of the San Francisco Police Department staked out the said premises on April 25, 1960. (R.T. 92.) On said date the premises, a basement apartment, were rented to a Mrs. Sylvia Fultz, who lived there with her two children. (R.T. 115.)

Earlier in the evening on said date, Customs agents Samaduroff and Ziesnitz and Narcotics agents Feldman and Cain recorded the serial numbers of four $20.00 bills in Government funds (R.T. 22-3) in the office of the Federal Bureau of Narcotics. They left the Federal Building and met Raoul Miller across the street, searched him and his car, gave him the marked $80.00 and followed him to Van Ness between 14th and 15th Streets. (R.T. 23-4.) Miller was a special employee for the Customs Service and "assisted" them in "investigations". (R.T. 28-9.) His duties were to learn all he could about narcotics smuggling and traffic. (R.T. 29.) He assisted the San Francisco Office for three to four or possibly five months and worked on six to a dozen cases. (R.T. 30-31.) The record does not show the results of these other cases.

Prior to the arrival of Miller's car in the vicinity of 383-A South Van Ness and at or about 7:00 P.M. on April 25th, Agent Cain and Officer Fogarty of the San Francisco Police Department commenced a surveillance of the said premises. (R.T. 42.) At about 7:20 P.M., Petitioner drove up and parked his car almost in front of the said premises. (R.T. 44.) Another car, operated by John Martinez, parked directly in front of Petitioner's car. (R.T. 44.) Martinez had an unknown Mexican male with him. (R.T. 60.) At the time of the arrival of these said cars, all three persons were "unidentified persons". (R.T. 60.) When the cars parked, the persons got out of the car and had a ten to fifteen second conversation before they entered 383-A South Van Ness. (R.T. 62.) Martinez was carrying a large brown paper sack about two feet in length and eighteen inches in diameter. (R.T. 45.) Presumably, this was a standard grocery sack in that Petitioner testified that he saw a loaf of bread sticking out. (R.T. 144.)

After they entered the premises, Elroy Jones [who was not an informant at the time (R.T. 64) but was known to the agents as a defendant in another narcotics case (R.T. 91)], arrived on foot. (R.T. 47.) He had come from the direction of 16th Street. (R.T. 63.) He entered the premises at 383-A South Van Ness and came out (R.T. 63) four or five minutes later. (R.T. 64.) He walked across the street to the corner of 15th and South Van Ness and stood there while Miller walked up to meet him. (R.T. 64-5.) Jones and Miller had a conversation near a phone booth which lasted approximately one and one-half minutes. (R.T. 65.)

There was no evidence as to what was said in this conversation and Jones crossed the street and re-entered the premises at 383-A South Van Ness while Miller walked slowly down South Van Ness to his car. (R.T. 66.) Jones came out of the premises almost immediately, carrying a package in his right hand partially under his sweater and partially sticking out. (R.T. 66.) He crossed the street, joined Miller, and the two walked to Miller's car and entered it. (R.T. 66.) They remained in the car three to four minutes when Jones got out and Miller drove off. (R.T. 67.) Jones walked toward the grocery store which is located almost at the corner of 14th and South Van Ness. (R.T. 67-8.)

Martinez and the unidentified Mexican left the premises and went to a bar and cafe on the corner of 14th and South Van Ness. (R.T. 68.) Petitioner came out of the premises and walked toward the said grocery store with two children. (R.T. 84.) Shortly thereafter, appellant and Jones were walking on the South side of South Van Ness, toward 383-A. There were two children with them and Petitioner was carrying a bag of groceries. (R.T. 70.) Appellant and the two children went into 383-A South Van Ness and Jones continued down South Van Ness to his car which was parked between 15th and 16th Streets and drove off. (R.T. 71.)

When Miller drove off, he was followed by Agent Samaduroff to Market Street and Van Ness Avenue. (R.T. 25-6.) Miller handed a package to the agent which appeared to be marihuana (R.T. 26) and he radioed the other agents and so informed them. (R.T. 26-7; 49.)

After obtaining the above information, Agents Cain, Feldman, Wilkins, Fahey and Han and Officers Caulfield and Fogarty proceeded to 383-A South Van Ness. (R.T. 50.) They did not have a warrant. (R.T. 102.) Agent Cain tried the door. It was unlocked but not open. (R.T. 50.) Agent Cain knocked on the door and hollered in a loud tone of voice: "Federal Narcotics Agents. Open the door, I want to talk to you." (R.T. 50.) There was no response, but voices could be heard inside. He turned the latch to the door and it opened. Petitioner, another unidentified person and Mrs. Fultz were drinking coffee and eating cupcakes in the kitchen. (R.T. 51.) Cain approached appellant and again identified himself and Agent Feldman placed appellant under arrest for a violation of the Federal Narcotics Laws (R.T. 51), immediately after entering the premises. (R.T. 76.)

Petitioner was immediately handcuffed (R.T. 85) and the marked Federal money originally given to Miller was found on his person. (R.T. 77.) Agent Cain, thereafter, walked into the bedroom and found bulk marihuana spread out on the bed. (R.T. 77-78.)

Petitioner explained that Jones gave him the money to give to a friend. (R.T. 151; 77; 169.)

Only one agent, Ira C. Feldman, testified as to any purported admissions by petitioner. He stated that when he asked petitioner who the marihuana belonged to, petitioner said he was holding it for a friend. Later, petitioner purportedly told Feldman that the marihuana belonged to Martinez and that Martinez had left it at his house to sell. (R.T. 88, 100.) The

other agents that testified stated they did not remember any of the conversations with petitioner in the apartment. (Agent Samaduroff, R.T. 39; Agent Cain, R.T. 76, 79, 80; Agent Wilkins, R.T. 174.) Petitioner testified that the first time he saw the marihuana it was in the hands of an agent (R.T. 157, 163) and "they" kept insisting it was his and he insisted it wasn't. (R.T. 160-1.) It is interesting to note that Agent Feldman misplaced the grocery store heretofore referred to by approximately a city block. (R.T. 96, 203.)

Agents Cain, Feldman and Wilkins testified that petitioner said he lived at the premises. Petitioner and Mrs. Fultz denied this.

At the close of the Government's case, petitioner moved for a continuance on the ground that Martinez and Jones were necessary witnesses. Both had plead "Guilty" to the offenses charged herein. (R.T. 101.) Jones was on Federal probation (R.T. 101) and Martinez was in San Quentin Prison. The Court can take judicial notice that the Federal Probation office is in the vicinity of the trial Court and that San Quentin Prison is in Marin County which adjoins the City and County of San Francisco. Thus, both could have been obtained by process within a short time. However, the motion for a continuance was denied. (R.T. 122.)

Petitioner thereupon indicated to the Court that he desired to discharge his attorney and to hire another attorney. The request was denied. He then categorically discharged his attorney and moved for a mis-

trial. The Court denied the discharge and the motion. (R.T. 110-113.) The colloquy between petitioner, his counsel and the Court is set forth in the footnotes of the opinion of the Circuit Court in the appendix hereto. (Appendix, Exhibit A, fn. pages vi through ix, inclusive.)

III. ARGUMENT

NO PROBABLE CAUSE.

Petitioner did not move to suppress the evidence herein as required by Rule 41(e), Federal Rules of Criminal Procedure. The legality of the search and arrest were challenged in the first instance before the Court of Appeals under Rule 52(b), Federal Rules of Criminal Procedure. The Court of Appeals, Ninth Circuit, had refused to consider claims similar to those advanced by petitioner where no motion to suppress evidence had been made under Rule 41(e) in *Billeci v. United States*, 290 F.2d 628 (9th Cir. 1961). However, in petitioner's case, the Circuit Court held, acting under Rule 52(b), that there was no error in admitting the marihuana and marked money into evidence against petitioner. (See Appendix, Exhibit A, pp. v, vi.)

It is submitted that the Court of Appeals properly examined the facts and circumstances of the case to determine whether there was probable cause for petitioner's arrest and search for the first time on appeal under Rule 52(b), but that its conclusion that it was a legal arrest and search is erroneous.

This Court has restated as recently as this term in *Wong Sun v. United States*, 371 U.S. 471, 479, the standard of probable cause for making an arrest:

> "* * * It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see *Henry v. United States*, 361 U.S. 98, 101, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, *Carroll v. U.S.*, 267 U.S. 132, 162—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' *Brinegar v. United States*, 338 U.S. 160, 176."

Herein, the arresting federal agents had the following information *prior* to petitioner's arrest: (1) The United States Customs Service gave information to the Federal Bureau of Narcotics that large amounts of marihuana were being smuggled into San Francisco (R.T. 92); (2) they had utilized an informer by the name of Raoul Miller and Miller could make a purchase of marihuana from Elroy Jones (R.T. 92); (3) the United States Customs Service informed the Federal Bureau of Narcotics that they "*believed*" some marihuana would be hidden at 383-A South Van Ness Avenue, San Francisco (R.T. 92); (4) the agents staked out the said premises and saw three "unidenti-

fied persons" (one being the petitioner) enter—one had a large paper bag (R.T. 60); (5) thereafter, the said Elroy Jones arrived at the premises and went inside (R.T. 91); (6) four or five minutes later he left the premises and met Miller outside (R.T. 64-65); (7) Jones went back into the premises and came out with a paper bag which he gave to Miller in exchange for $80.00 in marked money (R.T. 66); (8) Jones walked toward a store on the corner of 14th and South Van Ness (R.T. 67-8); (9) appellant came from the premises and walked to the same grocery store with two children; and, (10) shortly thereafter, Jones, petitioner and the two children were walking together toward the premises. Petitioner had a bag of groceries. Appellant entered the premises and Jones continued to his car. (R.T. 70-71.)

On the basis of the aforesaid information, the agents entered the premises, *uninvited*, and arrested petitioner. *After petitioner's arrest*, a search of his person revealed the $80.00 in marked money and a search of the premises revealed the contraband.

Within the theory of *Wong Sun v. United States* (supra) there is no doubt that the agents had probable cause to arrest and search Jones. However, it is difficult to see any difference between the probable cause, or lack of same, for the arrest of appellant, Sylvia Fultz or the unidentified Mexican male who was on the premises. Taking any one of the ten points of information possessed by the agents, there is no probable cause for petitioner's arrest. Taking all the information, there was no probable cause for peti-

tioner's arrest. It is submitted that had the agents presented the information to the United States Commissioner, no warrant would have issued. And, in this regard, it should be noted that there was no pressing need to enter the premises without a warrant and that the agents should have applied for one from the Commissioner. See the concurring opinion by Justice Douglas in *Wong Sun v. United States* (supra) and the Fourth Amendment to the United States Constitution.

In *Johnson v. United States*, 333 U.S. 10, the government maintained that they had reasonable cause to arrest the defendant therein as she was the sole occupant of a room from which the smell of burning opium was emanating. After the arrest, the search revealed contraband. The Court said at page 16:

> "* * * the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. * * *"

There were more circumstances to indicate probable cause in the *Johnson* case than there are in the case at bar. The Government cannot herein justify the arrest by the search and the search by the arrest.

In *Hernandez v. United States*, 17 F.2d 373 (9th Cir. 1927), as herein, the officers who made the arrest knew nothing whatever of the defendant or his past conduct. The fact that he was seen coming from a suspected house in company with a suspected woman, and that he and the woman were walking down the street looking around in what the officers thought was

a suspicious manner constituted all the evidence of probable cause. The Court held that such falls far short of presenting probable grounds of suspicion supported by facts which would warrant a cautious man in believing that the defendant had committed a felony. At most, the circumstances were sufficient to cause only a suspicion. Mere suspicion or suspicious circumstances, it has been repeatedly held, do not create probable cause. Certainly, there were nothing more than suspicious circumstances pointing toward petitioner herein. At most, the agents had information upon which to start an investigation. Entering the premises without probable cause or without a warrant, the agents were trespassers with no legal right to arrest or search the petitioner.

Being trespassers at the residence of Sylvia Fultz, and having no probable cause to arrest petitioner, any evidence obtained by the agents while on the premises would be inadmissible against petitioner. See *Nardone v. United States*, 308 U.S. 338, for the "*fruit of the poisonous tree*" Doctrine. See also *Jones v. United States*, 362 U.S. 257, wherein it was held that a visitor has standing to attack the illegality of the search. This would apply to the marihuana found as a result of the search as well as the marked money found on defendant.

DENIAL OF PETITIONER'S MOTION TO DISCHARGE COUNSEL

The right to counsel is both constitutional and statutory. See *Sixth Amendment*, United States Constitution and Title 28, *U.S.C.* §1654 (63 Stat. 103).

It is submitted that where the Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall * * * have the assistance of Counsel for his defence,"

that the word "Counsel" embraces "effective and efficient."

Petitioner herein attempted to discharge his attorney after the government rested its case because "she won't cooperate with me." (R.T. 109, Appendix, Exhibit A, on pages vi and vii.) He also told the Court he would hire another attorney. (R.T. 110, Appendix, Exhibit A, fn. p. vii.) Thereafter, he *unequivocally* discharged his attorney and stated to the Court that he would conduct the case himself. (R.T. 110, Appendix, Exhibit A, fn. p. vii.) The Court refused to recognize the discharge. It is submitted that the Court prejudicially erred and was in violation of the *Sixth Amendment* in not allowing the defendant to discharge his counsel and proceed in propria persona.

In *McDonald v. Hudspeth*, 113 F. 2d 984 (10th Cir., 1940), the attorney made his first appearance two weeks prior to the first day of trial. On the day of trial, defendant told the Court that *differences* had arisen between himself and counsel and that he wanted other counsel. The trial Judge was not informed of the nature of the differences. The Court

refused and ordered the trial to proceed. It stated at page 985:

> "* * * * The trial judge might have thought that * * * he could not disregard the public interest and further delay the trial because of some *undisclosed reason.* * * *" (Emphasis added.)

The Court did not have to resort to conjecture herein inasmuch as the defendant was quite loquacious and specific as to his reasons for substitution and discharge. (R.T. 109-114, Appendix, Exhibit A, fn. pp. vi-viii, inclusive.) A careful reading of the petitioner's statements to the Court might well indicate to the Court that there would be no prejudice to petitioner with the discharge of counsel and that he would be fully competent and able to conduct his own case.

As stated in *Duke v. United States*, 255 F.2d 721, 724 (9th Cir., 1958):

> "* * * First, an accused has an unquestioned right to defend himself. Second, an accused should never have counsel not of his own choice forced upon him."

In the *Duke* case, Duke made an agreement with the Court to have counsel represent him with certain limitations. Duke was an attorney. He claimed on appeal that he had wished to proceed in propria persona. The Court stated at page 726:

> "Although there are expressions which, taken out of context, might indicate that Duke wished to proceed in propria persona, *he never at any time unqualifiedly took that position.* * * *" (Emphasis added.)

Petitioner cannot be held to the degree of knowledge or background of an attorney, though in his colloquy with the Court he appeared well able to represent himself. It is obvious from the Reporter's Transcript of the record that if petitioner had gone any further in protecting his record that he would have been in a more perilous position than he was. A contempt citation would have only compounded his problems. Appellant unqualifiedly took the position that he discharged counsel and wished to proceed in propria persona. It is submitted that the Court's refusal to grant the discharge was prejudicial error and in violation of the *Sixth Amendment*.

The discharge of counsel should not be confused with the motion for continuance (although, taken together, there appears to be an unchallengable denial of due process under the *Fifth Amendment*). If counsel had been discharged, it is possible and probable that petitioner would have proceeded with his defense. Conducting his own direct and cross-examination, the case might not have gone to the jury on the second day. At the end of the second day, personally or through other counsel, he could have had Jones and Martinez before the Court. The Court's ruling prevented this. The Court's refusal to deny recognition of petitioner's discharge of counsel was reversible error in that its ruling violated the provisions of the *Fifth* and *Sixth Amendments* as well as Title 28 *U.S.C.* 1654 (63 Stat. 103).

DENIAL OF PETITIONER'S MOTION FOR A CONTINUANCE

The government rested its case after eliciting testimony from four persons. They were George D. Crane, Chemist, U. S. Treasury Department; Paul Samaduroff, Agent, United States Customs Service; and Agents Lowell Cain and Ira C. Feldman, Federal Narcotics Bureau. Except for purported admissions made to Agent Feldman, the conviction could not stand as a matter of law regardless of the search and seizure problem. He is the only Agent who testified as to any purported admissions. Agents Fahey, Wong, Ziesnitz and Officers Fogarty and Caulfield, all present at the time of the arrest and search were not called by the Government. Agent Samaduroff (R.T. 39), Agent Cain (R.T. 76, 79, 80) and Agent Wilkins (R.T. 174) did not remember any admissions of petitioner. It should be pointed out that Agent Feldman is the Government witness who misplaced the grocery store heretofore referred to a full city block, bringing it into his view during the stake-out prior to the arrest and search. (R.T. 96, 203)

It is obvious from the record that petitioner was surprised by the testimony of the purported admissions and the failure of the Government to call Miller, Jones and Martinez. (See Appendix, Exhibit A, fn. pp. vi, vii, viii.) The record indicates that Jones, who was on probation, and Martinez, who was imprisoned in nearby San Quentin, were available to the prosecution and could be produced with little difficulty in a short time. Both had plead guilty to the offenses for

which petitioner was charged. (See Appendix, Exhibit A, fn. 4, p. iv.)

Though petitioner did not comply with Rule 13(b), Rules of Practice, United States District Court, Northern District of California, he personally informed the Court the reasons for which he desired a continuance. He wanted Martinez "that had this marihuana" and Jones "who gave me the money." (R.T. 110.) In *Hewitt v. United States*, 110 F.2d 1 (8th Cir., 1940), though the Court did not abuse its discretion in denying a motion for continuance, it stated at page 8:

> "* * * In the absence of any showing that a continuance would enable Hewitt to better defend himself against the charge that he aided in the commission of the robbery, we think the court did not err in denying his motion."

Hewitt moved for a continuance during the trial. No assurance was given the Court that if the continuance were granted the defendant would be benefited in any way. As stated heretofore, petitioner personally informed the Court of the necessity of having Jones and Martinez before the Court for his defense after the Government refused to call them. Since both had plead guilty and their testimony would not incriminate them, it might well be inferred or presumed that their testimony would be against the position of the Government. As stated in *Yaw v. United States*, 228 F.2d 382 (9th Cir., 1955), at page 383:

> "It is significant that the United States did not produce Peltier as a witness, he having plead guilty and hence his testimony as to when he acquired the cigarettes could not incriminate him. A witness available to the prosecution to maintain its burden of proof which it does not produce or explain why it cannot, is presumed one who would testify against the government. See Wigmore on Evidence, §§ 286-290."

It should not be forgotten that the Court on its own motion *could* have directed the Warden of San Quentin Prison by way of writ to have Martinez present the following day. It is submitted that there was an abuse of discretion requiring a reversal of petitioner's convictions and it appears from the record in its entirety that this petitioner has been denied due process of law under the *Fifth Amendment* of the United States Constitution.

IV. CONCLUSION

It is respectfully submitted that there was no probable cause for the arrest of petitioner and no probable cause for the search of the premises at 383-A South Van Ness Avenue or of petitioner's person. Therefore, all the real evidence herein cannot be used by the Government to sustain the convictions of petitioner and the said convictions should be reversed.

Petitioner's motion to discharge counsel should have been granted and failure of the trial Court to do so is prejudicial error and is in violation of the petitioner's rights secured by the *Fifth* and *Sixth Amendments* and the laws and customs of the United States.

Refusal of the trial Court to grant petitioner's motion for a continuance was an abuse of discretion and violated his rights secured by the due process clause of the *Fifth Amendment*.

Because of the foregoing, it is urged that a writ of certiorari issue and that the convictions herein be reversed.

Dated, San Francisco, California,
April 10, 1963.

SOL A. ABRAMS,
Attorney for Petitioner.

EDWARD L. CRAGEN,
Of Counsel.

(Appendix Follows)

Appendix

EXHIBIT A

United States Court of Appeals
For the Ninth Circuit

Manuel Sanchez,
Appellant

vs.

United States of America,
Appellee

No. 17,726
Dec. 26, 1962

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: HAMLIN, MAGRUDER and DUNIWAY, Circuit Judges

HAMLIN, Circuit Judge;

Appellant was convicted on two counts[1] of an indictment charging violations of 21 U.S.C. § 176a.[2] On appeal he alleges error in that: (1) there was no

[1] In Count One Sanchez was charged jointly with one John Henry Martinez with having sold and facilitated the sale of one pound of marihuana; and in Count Two Sanchez was charged jointly with Martinez with having concealed and facilitated the concealment of five pounds of marihuana. Sanchez was sentenced to five years on each count, the sentences to run concurrently.

[2] "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, . . . , or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or

probable cause for his arrest and consequently the evidence obtained in the search incident thereto was inadmissible; (2) the trial court abused its discretion in not granting his motion for a continuance; (3) the court committed prejudicial error in not granting his motion to discharge counsel; and (4) the evidence was insufficient to support his conviction.

The evidence, viewed—as it must be[3]—in the light most favorable to the government, is set forth in the following paragraphs.

The United States Customs Service informed the Federal Narcotics Bureau that large amounts of marihuana were being smuggled into San Francisco and that it was believed that some of the marihuana would be used and concealed at 383A South Van Ness Avenue in San Francisco. Arrangements were made for a special employee of the Customs Service, Raoul Miller, to make a purchase of marihuana from one Elroy Jones (known to be a defendant in another narcotics case) at or near these premises on April 25, 1960. Federal narcotics agents, customs agents and officers of the San Francisco police department staked out the premises on this date.

At or about 7:20 p.m. appellant drove up in front of the premises and parked his car. Another car

brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . , shall be imprisoned . . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[3]Teasley v. United States, 292 F.2d 460, 462 (9th Cir. 1961).

operated by one John Martinez arrived at the same time and was parked directly in front of appellant's car. Martinez and appellant got out of their cars, conferred briefly, and entered 383A South Van Ness; Martinez was carrying a large paper sack. Elroy Jones arrived at about 8:00 p.m. and also entered 383A. A few minutes later Jones came out of the premises and walked across the street to the corner of 15th and South Van Ness where he was joined by the special employee, Raoul Miller. They had a conversation lasting approximately one to one-and-a-half minutes. Jones then re-entered 383A and Miller walked slowly down South Van Ness Avenue to his car. At about 8:10 p.m. Jones came out of 383A carrying a package. He crossed the street, joined Miller and the two walked to Miller's car and entered it. Jones got out of the car after a very short time. Miller drove away, and Jones walked toward the corner of 14th and South Van Ness. Appellant came out of 383A with two small children and also proceeded toward the corner of 14th and South Van Ness where he was joined by Jones. They conversed and then walked back toward 383A. Appellant and the two children entered 383A and Jones continued on to his car and drove away.

After Miller had driven away following his meeting with Jones, he met a federal narcotics agent at the corner of Market and Van Ness and handed the agent a package of marihuana. The agent searched him and found that he did not have the $80 in marked money that had been given to him for the purpose of making

the purchase. This information was radioed to the agents who were watching the premises at 383A South Van Ness. These agents then proceeded to the premises. An agent knocked on the door and announced in a loud voice: "Federal narcotics agents. Open the door, I want to talk to you." Upon receiving no response, the agent turned the doorknob and the door, which was unlocked, opened. The agents entered and placed appellant under arrest. Appellant was searched and the marked money was found on his person. One agent testified that appellant stated that he lived at the premises. The premises were searched and a quantity of marihuana was found in the bedroom. When asked where he got the marked money and the marihuana, appellant stated that he was holding the money and marihuana for a friend. An agent testified later, at the office of the Bureau of Narcotics, appellant told him that the marihuana belonged to Martinez[1] and had been left at his house to sell.

The marihuana which was the subject of the sale and the marihuana found at 383A South Van Ness, together with the four marked $20 bills found on appellant's person, were introduced into evidence at the trial. Although appellant now contends that his arrest was unlawful and that therefore the evidence obtained incident thereto was inadmissible, no motion to suppress the allegedly illegally obtained evidence, as required by Rule 41(e), Federal Rules of Criminal

[1]Martinez and Jones entered pleas of guilty, Jones receiving probation and Martinez being sentenced to a term of five years. Appellant also entered a plea of guilty, but later with the permission of the court withdrew the plea and proceeded to trial by jury.

Procedure, was made before or during trial; nor was any objection raised by appellant when the evidence was admitted. Appellant, however, requests this court to consider his contentions under Rule 52(b).

Under Rule 52(b) we may in the exercise of our discretion notice plain errors affecting the substantial rights of a party though they were not brought to the attention of the trial court.[5] We hold in the instant case that there was no error, let alone one affecting the substantial rights of appellant, in admitting the marihuana and marked money into evidence. The quantum or quality of evidence needed to show probable cause for an arrest is different from that required to sustain a conviction of a violation of the substantive offense.[6] A federal narcotics agent may under 26 U.S.C. § 7607 make an arrest without a warrant if he has "reasonable grounds to believe that the person to be arrested has committed or is committing" a violation of a law of the United States relating to marihuana. Stated another way, it need only be shown in a particular case that the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are "sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[7] We have examined the

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[5] See Billeci v. United States, 290 F.2d 628 (9th Cir. 1961), in which this court refused to consider claims similar to those now advanced by appellant where no motion to suppress evidence had been made under Rule 41(e).

[6] Brinegar v. United States, 338 U.S. 160, 174-175 (1949); Draper v. United States, 358 U.S. 307, 311-313 (1959).

[7] Carroll v. United States, 267 U.S. 132, 162 (1925).

evidence in this case, portions of which are summarized above, and believe that under the facts and circumstances of this case there was probable cause for appellant's arrest.

We shall next consider appellant's contentions that the trial court abused its discretion in not granting appellant's motion for a continuance and prejudicially erred in not granting his motion to discharge counsel.

At the conclusion of the government's case the court adjourned until the next day. On the next day, out of the presence of the jury, counsel for appellant moved for a continuance, stating that the government had failed to call Martinez and Jones as witnesses and that counsel would like to bring Martinez (Who was in San Quentin) and Jones (whose whereabouts was unknown) into court to testify. The proceedings before the court, in the jury's absence, which followed are set forth in the margin.*

*"MR. CLANCEY: The Government opposes the motion, Your Honor, on the grounds this case has been pending since May or early June. There have been numerous continuances. This matter of which Mrs. Mumdri speaks is obviously not a trial preparation as until this time there has been no request of the Government to assist her in any manner. The Government is not required to produce every witness the defense thinks should be before the Court in the case and it is now brought up in the middle of a trial after they have seen the Government's case. We think it is untimely, unreasonable and therefore should be denied.

• • •

"THE COURT: Well, there is nothing, in my opinion, that warrants granting any continuance in this case. It is indefinite in every respect. I will deny the motion for a continuance. You can bring in the jury.

"THE DEFENDANT: Your Honor, may I speak

"THE COURT: Not unless——

"THE DEFENDANT: I wish to discharge my attorney.

"THE COURT: Right in the middle of the case?

We hold that the district court did not abuse its discretion in denying appellant's motion for a continu-

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"THE DEFENDANT: She won't cooperate with me, Your Honor.

"THE COURT: Come up and make a statement.

"THE DEFENDANT: Your Honor, I only have one way to defend myself and that is with these witnesses, the persons John Martinez that had this marihuana and Mr. Elroy Jones who gave me the money. They are both vital to my defense. My attorney has not brang (sic) them in.

"THE COURT: Has not what?

"THE DEFENDANT: Hasn't been able to locate them and we can't seem to agree. I wish to have these witnesses brang (sic) in for my defense. They (sic) have been perjured statements by federal agents and these witnesses are vital to my defense.

"THE COURT: What has that got to do with what you just said, with discharging your attorney. What are you going to accomplish by that?

"THE DEFENDANT: I will hire another attorney.

"THE COURT: Not in the middle of the case.

"THE DEFENDANT: I don't like the way she has been handling it. She hasn't been able to bring up these witnesses. She says she has, but she hasn't, and the prosecution doesn't want to bring any witnesses in. It's all hearsay.

"THE COURT: The case, the Government's case is in and you are dissatisfied with your attorney?

"THE DEFENDANT: It's not that.

"THE COURT: That's the oldest game in the book with respect to delaying cases.

"THE DEFENDANT: It's no game to me, Your Honor.

"THE COURT: I won't allow the attorney to withdraw in the middle of this case.

"THE DEFENDANT: Well, I discharge her.

"THE COURT: How are you going to conduct your case?

"THE DEFENDANT: I will conduct it myself.

"THE COURT: What is it you are going to do? What are you going to do now if you handle it?

"THE DEFENDANT: I will make the attempt to bring these witnesses in.

"THE COURT: We are going on with the trial of the case this afternoon. This is the time set for the trial of the case.

"THE DEFENDANT: I will start phoning, making phone calls.

"THE COURT: You are in court now, my friend. You are here on bail in the United States District Court, charged with a serious offense. Your trial has proceeded, the Government has concluded its case. You don't like the looks of the case apparently now, you don't like the way your attorney has handled the case and you want

ance for the purpose of producing Martinez and Jones at the trial. Neither Martinez nor Jones was required

to discharge her. Well, if you do, you will have to proceed yourself. Are you going to take the witness stand yourself? Are you going to put some witnesses on the stand? How are you going to conduct your defense this afternoon?

"THE DEFENDANT: I will conduct it the best I can. Basically I want these witnesses. You don't seem to understand. I am not trying to pull any tricks."

"THE COURT: I am not talking about the witnesses. I have denied the motion for a continuance. The case is going ahead this afternoon. Why do you want to conduct your own defense this afternoon in this case, when you have got your attorney present? It isn't going to do you any good to do that.

"THE DEFENDANT: Well, Your Honor, who is going to bring these witnesses in?

"THE COURT: The motion for the continuance is denied. There isn't the slightest basis for asking for a continuance after the Government's case is concluded. No grounds have been stated, there is nothing to indicate what the witnesses will testify to, and there is no basis on which the Court can grant a continuance in the middle of the trial of the case. You better stay with your attorney.

"THE DEFENDANT: I make a motion for a mis-trial.

"THE COURT: You are attempting to appear for yourself?

"THE DEFENDANT: Yes.

"THE COURT: I will deny your motion. I will deny your motion for mis-trial.

"THE DEFENDANT: I want these witnesses to appear here. They are for my defense and vital to my defense. Nobody has brang (sic) them in.

"THE COURT: I will bring the jury in and we shall proceed with the trial of this case. If you have any further evidence to submit, you can submit it through your attorney or, if you want to——

"THE DEFENDANT: I discharge my attorney and call for a mis-trial.

"THE COURT: I have already ruled on that. Mr. Bailiff, bring in the jury please. I do not give permission for the counsel for the defense to withdraw. The Court considers if is still her duty to appear here. She is an officer of the Court and I will not allow a withdrawal in the case in the middle of the trial.

"MRS. MINUDRI: May the record show I have not asked for such permission.

"THE COURT: The record will show that you will continue to act for the Defendant in this case. I will say to you before the jury comes in, Mrs. Minudri, this is an old stunt. I have had it years ago, to come in and ask to be relieved of a case.

by the government to prove its case and thus there was no reason for the government to call them as witnesses. Since there was no showing as to the nature and materiality of the expected testimony of Martinez and Jones, the district court's refusal to grant the continuance was in accordance with the provisions of Rule 13(b), Rules of Practice, United States District Court, Northern District of California.[9]

The question remains whether the district court committed prejudicial error in denying appellant's motion to dismiss his counsel. Under 28 U.S.C. § 1654, "parties may plead and conduct their own cases personally" in courts of the United States. It would seem clear under this provision that a party who intelligently and competently waives the right to counsel prior to the commencement of trial should be al-

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"MRS. MINUDRI: I didn't ask for it.
"THE COURT: I didn't say you did, no.
• • •
"THE COURT: Ladies and gentlemen of the jury, the Government's case is concluded, as you were informed at the end of the session yesterday, and if the defense has any presentation of evidence, it will come forward at this time.
"MRS. MINUDRI: I would like to call Sylvia Fultz at this time.
• • •"

Sylvia Fultz, who lived at 383A South Van Ness, then testified concerning the events that occurred on the night in question and also as to her relationship with the accused. Appellant then took the stand and testified as to his version of the occurrences on that night. On cross-examination he admitted that he had previously been convicted of a felony.

[9]Rule 13(b) provides in pertinent part:

"A motion to postpone or continue a trial on the grounds of absence of a witness or evidence shall be made upon affidavit showing the nature and materiality of the expected testimony or evidence, and that diligent effort has been made to secure the witness or evidence."

lowed to conduct his own defense and this court has so held.[10]

If the defendant requests to conduct his own defense after the trial has begun, the trial judge is faced with a more difficult situation. First of all, he must, as in any case, determine whether, based upon the facts and circumstances of the case, including the background, experience and conduct of the accused, the request was intelligently made.[11] We feel that based upon the facts and circumstances of this case the district court could reasonably conclude that appellant had not made an intelligent waiver of his right to counsel. The only reason given by appellant for his desire to discharge counsel was that he (appellant) wanted to bring Martinez and Jones into court to testify and yet the court had repeatedly told him that he could not have a continuance for that purpose. When asked how he would proceed, he could only say

[10] In Reynolds v. United States, 267 F.2d 235 (9th Cir. 1959), the defendant, a college professor, made a specific and unequivocal request of the district court three days in advance of trial that he be allowed to conduct his own defense. There was no indication that the request was for the purpose of securing a delay in the proceedings or to permit the use of obstructionist tactics at the trial. The district court denied his request. The defendant appealed and on appeal the government did not oppose his request for reversal on the ground that the trial court had erred in refusing to allow him to proceed *pro se*. We held that the district court erred under the circumstances in denying the request and reversed the conviction. *Cf.*, United States v. Cantor, 217 F.2d 536, 538 (2nd Cir. 1954) and Brown v. United States, 264 F.2d 363, 366 (D.C. Cir. 1959) (dictum) in which the Second Circuit and the District of Columbia Circuit indicate that if a district court does err in refusing to allow a defendant to proceed in propria persona, such an error will not warrant reversal of the conviction in the absence of a showing that the defendant was prejudiced thereby.

[11] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

that he wanted these witnesses. We submit that under these circumstances had the district court discharged his counsel at that stage in the proceedings, appellant would be before this court today arguing that he had not intelligently waived his right to counsel.

Further, the orderly conduct of a jury trial is the responsibility of the trial judge.[12] It is clear, for example, that an accused does not have an absolute right to change attorneys during the course of a trial. In *United States v. Mitchell*,[13] the Court of Appeals for the Second Circuit stated:

> "The cases cited by defendant stress equally, as, indeed, they properly should, the right of an accused to act for himself and his right to have a lawyer assigned in his behalf. [Citations]. Obviously, however, those rights cannot be both exercised at the same time. The cases are dealing with a choice to be made at the opening of the trial. It would be unfair to say no further choice is possible after the case is opened, but it would be just as unfair to say that when a defendant sees a strong case made against him he can immediately dismiss assigned counsel and then obtain a delay—and often a mistrial, at least in districts where calendars are crowded—through the device of having new counsel assigned to him."

If the defendant does not request a change of counsel, but rather requests to conduct his own defense, it would seem that the trial court should have discretion

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[12] See, *e.g.*, Brasier v. Jeary, 256 F.2d 474, 478 (1958).

[13] 137 F.2d 1006, 1010-11 (2d Cir. 1943), adhered to on rehearing, 138 F.2d 831 (1943), cert. den. 321 U.S. 794 (1944).

to refuse the request if made only after a strong case has been presented against the accused and if from the circumstances it appears to be motivated by a desire to disrupt the orderly conduct of the trial. Thus, in *United States v. Foster*,[1] Judge Medina in refusing to allow a defendant to proceed in *pro se* stated:

> "Thus, at the outset, it seems significant that neither the Constitution nor the applicable federal statute lend the slightest support to the claim that Mr. Davis may dismiss his counsel, and sum up in his own behalf, as matter of right. The clear purport of the language just quoted seems to the contrary. One of the fundamental rights of defendants in criminal cases is the right to counsel. But the alleged absolute right, irrespective of the attendant circumstances, to dismiss counsel and carry on *pro se* is a quite different proposition. If such were the law, there would be a fertile field in which defendants in criminal cases could operate to frustrate justice and, under the aegis of an alleged constitutional or other right, resort to every bedevilment of the court and jury that the ingenuity of man could devise."

In the instant case appellant attempted to discharge his counsel after a strong case had been presented against him. There had been no indication prior to his request that he was in any way dissatisfied with the services of his counsel; nor was he able at the time of his request to give any convincing reason for his desire to discharge his counsel. Under the circum-

[1] 9 F.R.D. 367, 372 S.D.N.Y. 1949

stances, it would be reasonable for the trial court to conclude that appellant's request was actuated by a desire to disrupt the orderly proceeding of the trial. After the refusal of his request, he took the witness stand and under the tutelage of his counsel presented his defense. At the conclusion of the case, his counsel presented an able argument in his behalf to the jury. We hold that under the circumstances of this case, the district court did not err in refusing to allow appellant to conduct his own defense.

It is clear that there was sufficient evidence to support appellant's conviction and therefore the judgment is affirmed.

(Endorsed) Opinion Filed Dec. 26, 1962.

Frank H. Schmid, Clerk.

EXHIBIT B

United States Court of Appeals
for the Ninth Circuit

Manuel Sanchez,
Appellant,
vs.
No. 17726
United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Dec. 26, 1962.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

MANUEL SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1018

MANUEL SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-xiii) is reported at 311 F. 2d 327.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1962 (Pet. App. xiv). A petition for rehearing was denied on February 13, 1963 (Pet. 2). On March 4, 1963, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari

to and including April 13, 1963, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioner's motion for a continuance for the purpose of securing the government's help in producing witnesses, when the first indication that petitioner desired such witnesses came after the completion of the government's case at a trial commencing almost seven months after petitioner's arrest.

2. Whether the trial court properly denied petitioner's request, after the government had completed its case against him, to discharge counsel for the purported reason that counsel had not been able to produce witnesses whose presence petitioner desired.

3. Whether there was probable cause for petitioner's arrest.

STATEMENT

An indictment returned in the United States District Court for the Northern District of California charged petitioner and one John Henry Martinez in two counts with the sale of one pound of marihuana and with the concealment of five pounds of marihuana, in violation of 21 U.S.C. 176(a). Petitioner went to trial alone before a jury and was found guilty.[1] He was sentenced to imprisonment for five years on each count, the terms to run concurrently.

[1] Martinez entered a plea of guilty to these charges in other proceedings.

1. At the beginning of trial on November 8, 1960, the Assistant United States Attorney informed the jury in his opening statement that the government's witnesses would be a chemist, two agents of the Federal Bureau of Narcotics and one agent from the Customs Service (Tr. 4-5). The testimony of these witnesses developed the following facts:

The narcotics agents had received information from the Customs Service that large amounts of marihuana were being smuggled into San Francisco from Mexico. The Service was using an informer by the name of Raoul Miller who could make a purchase of this marihuana from an Elroy Jones. It was believed that some of the marihuana would be hidden at 383-A South Van Ness Avenue. With this information, the agents acted with local police to place the described premises (then rented to a Mrs. Fultz) under surveillance on April 25, 1960 (Tr. 92). Earlier on the same evening agents had searched the person and automobile of Raoul Miller, given him four twenty-dollar bills, the serial numbers of which had been recorded, and followed him to the vicinity of the premises under surveillance (Tr. 23-24).

At about 7:20 p.m., petitioner in one car and Martinez and an unidentified man in another car parked in front of the premises and, after a short conversation, entered the apartment. Martinez was carrying a large brown paper sack (Tr. 44-45, 59-60).

A short time later Elroy Jones arrived and entered the premises. He came out about five minutes later, crossed the street and stood until he was joined

by Miller, the informer. The two men had a conversation and then separated. Jones reentered the apartment. A few minutes later he came out again, carrying a brown package, and rejoined Miller in Miller's car. In a minute or two Jones alighted from the car and Miller drove off (Tr. 47-48; 83).

Jones, leaving Miller, walked toward a grocery store. Martinez and the unidentified male left the apartment and entered a corner bar. Petitioner also came out of the apartment with two small children and walked toward the grocery store. Shortly thereafter, petitioner, Jones and the children were seen walking back toward the apartment with petitioner carrying a bag of groceries. Petitioner and the children entered the apartment and Jones left the scene (Tr. 48-49; 84).

At this point, the surveillants received a radio transmission from fellow officers that the special employee Miller had, a short distance away, turned over a package of marihuana to them (Tr. 48-49, 84).

Thereupon the surveillants approached the entrance to the apartment. They knocked on the door, announced that they were federal narcotics agents and that they wanted to talk. There was no response, but voices could be heard inside. One agent turned the latch to the door and it opened. Petitioner, another person and Mrs. Fultz were in the kitchen. The agents arrested petitioner and found on his person the four marked bills which they had given to Miller. In the bedroom they found on the bed several squares of brick-type marihuana. Petitioner said he was holding the money for another. He said he lived in the apartment (Tr. 50-80; 84-88). Later at the

Bureau of Narcotics petitioner told one agent that the marihuana belonged to Martinez who left it at his house to sell (Tr. 88).

2. On cross-examination of one of the agents, defense counsel inquired about the pleas of Martinez and Jones. In answer to counsel's inquiry, the agent denied that Martinez and Jones had made statements exonerating petitioner (Tr. 101-102).

The day after the government had rested its case, the defense moved orally for a continuance (outside the presence of the jury) "for the reason that the prosecution has failed to bring in either Mr. Martinez or Mr. Elroy Jones, both of whom—whose whereabouts are known to them but unknown to us" [2] (Tr. 107-108). Government counsel opposed the motion on the ground that this first request for the government's help in producing the witnesses was untimely (Tr. 108-109). The court denied the motion (Tr. 109).

Thereupon petitioner announced that he wished to discharge his attorney saying, "She won't cooperate with me * * *," and, "She hasn't been able to bring up these witnesses." Petitioner said that Martinez "that had this marihuana" and Jones "who gave me the money" were vital to his defense. He said he would hire another attorney. The court reminded petitioner that the government's case was in. Noting that this was "the oldest game in the book with

[2] It appears that Jones at the time was on probation in connection with this offense and that this was known to counsel (Tr. 101). Martinez, who had entered a plea of guilty to a state charge, was in San Quentin prison.

respect to delaying cases," the judge said he would not allow petitioner's attorney to withdraw in the middle of the case. Petitioner replied, "Well, I discharge her." Asked how he would conduct his case, petitioner said, "I will make the attempt to bring these witnesses in." Reminded that the court had denied a continuance and that the case was going ahead, petitioner moved for a mistrial. The court denied the motion and refused permission for the withdrawal of counsel. The defense proceeded, with petitioner and Mrs. Fultz taking the stand (Tr. 109 *et seq.*).[3]

ARGUMENT

1. The court below properly held that the trial judge did not abuse its discretion in denying petitioner's motion for a continuance for the purpose of producing Martinez and Jones. See *Isaacs* v. *United States*, 159 U.S. 487. The record negates petitioner's contention that he was surprised by the failure of the government to produce the two men. At the outset of the trial, government counsel announced the identity of his witnesses and exactly what his proof would show. Neither Martinez nor Jones was named as a witness. It was apparent then, as it was throughout the government's development of its case, that neither individual was required to prove the government's case and that therefore the government

[3] The colloquy which took place at this time is recited in full in footnote 8 of the opinion of the court of appeals (see Pet. App. vi-ix).

did not need to call, or contemplate calling them.[4] Yet the defense gave no indication at all that it desired the production of these witnesses until after the completion of the government's case.

Moreover, petitioner did not say then what if anything these witnesses could have contributed to his defense. He did not support his motion for a continuance by affidavit showing the nature of the expected testimony as required by the district court rules,[5] nor did he supply this omission by an oral statement showing the nature of the testimony. Almost seven months had elapsed between the date of petitioner's arrest and the beginning of trial. It is reasonable to assume that, if petitioner had a bona fide desire to use these witnesses, some inquiry would have been made of government counsel prior to this time. There was no occasion for the district court to delay and disrupt the trial proceedings at this point for the requested continuance.

2. The same considerations of orderly trial procedure justified the district court's exercise of discre-

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[4] In her summation to the jury, defense counsel commented at length upon the failure of the government to bring in these witnesses and the informer (Tr. 185, 191). It does not appear that she asked for special instructions on the subject (Tr. 178).

[5] Rule 13(b), Rules of Practice, United States District Court, Northern District of California, provides in pertinent part: "A motion to postpone or continue a trial on the grounds of absence of a witness or evidence shall be made upon affidavit showing the nature and materiality of the expected testimony or evidence, and that diligent effort has been made to secure the witness or the evidence."

tion in denying petitioner's request to dismiss his counsel in the middle of trial. The request came after the government had concluded its case—a strong one—against petitioner. Petitioner asserted no good reason for the demand. He explained merely that counsel had not been able to bring in the witnesses Martinez and Jones, a matter with respect to which the court had previously denied a continuance. When asked how he would conduct the case without counsel he could only say that he would make the attempt to bring in these witnesses.

Whatever may be the considerations where an unequivocal, intelligently made request to proceed *pro se* is made in advance of trial with no indication that it is an obstructive stratagem,* those considerations are not pertinent here. There is no absolute right to discharge counsel *after the trial has begun.* To secure the reversal of a conviction because the trial judge denied a motion to discharge counsel there must be a showing that the defendant was prejudiced by the denial. *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940 (C.A. 2), certiorari denied, 360 U.S. 937; *United States* v. *Mitchell*, 138 F. 2d 831 (C.A. 2), certiorari denied, 321 U.S. 794. An accused's right to represent himself is not so absolute that it must be recognized when to do so would disrupt the court's business. *United States* v. *Private Brands*, 250 F. 2d 554 (C.A. 2), certiorari de-

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*See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279; compare *Brown* v. *United States*, 264 F. 2d 363 (C.A. D.C.), certiorari denied, 360 U.S. 911, and *Reynolds* v. *United States*, 267 F. 2d 235 (C.A. 9).

nied, 355 U.S. 957; *United States* v. *Foster*, 9 F.R.D. 367, 372 (S.D.N.Y.). Since a change in counsel or even a discharge will usually point to a continuance, it "should be had only when it is clearly necessary to safeguard the rights of an accused, when, indeed, the necessity of that safeguarding under the circumstances which have developed in a particular case outweighs the prejudice to the prosecution." *United States* v. *Mitchell*, 137 F. 2d 1006, 1011 (C.A. 2). Without adequate cause shown for a request to discharge counsel, the denial is not error. *United States* v. *Paccione*, 224 F. 2d 801, 802 (C.A. 2); *United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed on other grounds, 341 U.S. 494; *United States* v. *Mitchell*, *supra*, 137 F. 2d 1006 (C.A. 2). See also generally *Brown* v. *United States*, *supra*, 264 F. 2d 363 (C.A.D.C.), certiorari denied, 360 U.S. 911; *Egan* v. *Tects*, 251 F. 2d 571 (C.A. 9); *Duke* v. *United States*, 255 F. 2d 721 (C.A. 9), certiorari denied, 357 U.S. 920.

Petitioner went to trial with counsel and expressed no dissatisfaction at all until after the government's case had been proved against him. As noted above, he gave no adequate reason for desiring to discharge counsel. After his request was denied he took the stand and under examination by counsel told his story of being innocently involved in the charged offense by reason of his presence at a friend's house. Counsel thereafter made an able argument to the jury in his behalf. The district did not err in refusing to permit petitioner to conduct his own defense.

3. Petitioner recognizes that, since his first challenge to the legality of his arrest and search was made in the court of appeals below, the court could have refused to consider the issue. See *Billeci* v. *United States*, 290 F. 2d 628 (C.A. 9). See also *Campbell* v. *United States*, 297 F. 2d 526 (C.A. 9), certiorari denied, 369 U.S. 825. He argues, however, that the court of appeals, which did examine the record in response to his request that it exercise its discretion under Rule 52(b) to notice plain errors affecting substantial rights, improperly concluded that there was no merit to his contentions.

The court below was correct in holding that there was no error, much less one affecting substantial rights, in the admission into evidence of the marihuana and marked money. The quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case. *Wong Sun* v. *United States*, 371 U.S. 471, 479. Here the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were "sufficient in themselves to warrant a man of reasonable caution in the belief that" a narcotics offense had been or was being committed. See *Carroll* v. *United States*, 267 U.S. 132, 162; see also 26 U.S.C. 7607. The officers had information from a reliable source that a part of a large shipment of marihuana was believed to be hidden at the South Van Ness Avenue apartment and that a named informer could make a purchase of the marihuana through a named intermediary. They observed the intermediary enter the apartment, emerge with a

package and meet the informer under circumstances which gave them every reason to believe that a sale had taken place. That a transfer had in fact taken place was confirmed by information radioed to them. In the meantime, petitioner had been observed following a pattern of conduct that would indicate a proprietary interest in the apartment. He had also been seen meeting the intermediary immediately after the transfer. There was thus probable cause for his arrest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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